



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: RGI, Inc.--Request for Reconsideration

File: B-237868.2

Date: August 13, 1990

Edward J. Tolchin, Esq., Ginsburg, Feldman and Bress, for the protester.
Sean P. Morgan, Esq., Saul, Ewing, Remick and Saul, for Unified Industries, Inc., an interested party.
Peter D. Butt, Esq., Office of the General Counsel, Department of the Navy, for the agency.
Scott H. Riback, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Prior decision is affirmed where party requesting reconsideration fails to show any error of fact or law or new information which would warrant reversal or modification of prior decision.

DECISION

RGI, Inc. requests reconsideration of our decision in Unified Indus., Inc., B-237868, Apr. 2, 1990, 90-1 CPD ¶ 346, in which we sustained the protest of Unified Industries, Inc. (UII) against the award of a contract to RGI under request for proposals (RFP) No. N00600-89-R-1017, issued by the Department of the Navy for the acquisition of automated data processing services for the Naval Military Personnel Command. In that decision, we found that the Navy could not have properly determined that RGI had submitted the lowest cost offer and therefore that it had improperly made award to RGI on the basis of the initial offers without discussions. In its request for reconsideration, RGI argues that we improperly considered an issue beyond our jurisdiction, erroneously concluded that the Navy's cost realism analysis was improper and recommended an inappropriate remedy in light of our conclusions. We affirm our prior decision.

049213 / 142019

In its original protest, UII argued that the Navy had improperly conducted its cost realism analysis.^{1/} Specifically, UII argued that the Navy erroneously failed to adjust RGI's offer upward for evaluation purposes because RGI had proposed hourly wage rates for certain employees covered by the Service Contract Act which were below the rates prescribed by the Department of Labor (DOL) under the subject RFP. UII also argued that the agency had failed to evaluate both firms' proposals using the same number of labor hours contrary to the RFP, which provided that the same number of labor hours would be used in evaluating all firms. UII argued that the Navy evaluated its offer using the labor hours required to perform an "indoctrination" phase of the contract, but had not included the same hours in its evaluation of RGI.

In our decision, we agreed with UII that the agency had improperly conducted its cost realism analysis. We concluded that the agency had failed to adjust RGI's offer upward for evaluation purposes to account for the below-SCA wage rates proposed by RGI for certain employees. We also found that the agency had failed to evaluate both competitive range offerors using the same number of labor hours as required by the RFP. Because of this improper cost evaluation, the record, in our view, did not clearly demonstrate that the agency made award to the low cost offeror on initial offers. We sustained UII's protest and recommended that the agency hold discussions and, thereafter, make award in accordance with the RFP's stated evaluation criteria, terminating for the convenience of the government the contract awarded to RGI in the event that UII became the apparent successful offeror at the conclusion of those discussions.

RGI argues that we erroneously concluded that the agency had failed to demonstrate that the award had been made to the low cost offeror on the basis of initial offers in accordance with the Competition in Contracting Act (CICA) of 1984, 10 U.S.C. § 2305(b)(4)(A)(ii) (1988). In this respect, RGI argues that, despite the RFP's requirement for a cost realism analysis, the actual award under the RFP was for the dollar amount of the firm's proposed costs rather than its evaluated costs. Consequently, RGI states that the award was made to the firm whose proposal represented the lowest overall cost in accordance with CICA.

^{1/} The RFP, which contemplated the award of an indefinite quantity, indefinite delivery time and materials contract, called for the Navy to conduct a cost realism analysis of each firm's cost proposal.

We find that our original decision was correct and consistent with our Office's position regarding the award of contracts on the basis of initial offers where the RFP requires the conduct of a cost realism analysis. CICA requires that award on the basis of initial offers be made to the firm offering the lowest overall cost. 10 U.S.C. § 2305(b)(4)(A)(ii). The purpose of a cost realism analysis is to provide the agency with a more accurate assessment of what the probable cost associated with award to a particular firm will be. In other words, an agency cannot know whether it is making award on the basis of initial offers to the firm offering the lowest overall cost unless it has conducted a proper cost realism analysis which enables the agency to determine which firm has offered the lowest evaluated cost. See Planning Research Corp., B-237201; B-237201.3, Jan. 10, 1990, 90-1 CPD ¶ 131, aff'd, Planning Research Corp.--Request for Recon., B-237201.4, Apr. 5, 1990, 90-1 CPD ¶ 362.

Here, the agency's own cost evaluation showed several categories in which RGI had proposed labor rates below the SCA mandated rates. The evaluators concluded this deficiency should be a subject for discussion since RGI appeared to take exception to a material RFP term. Since the agency's cost realism analysis showed that the awardee was not proposing to pay SCA wage rates which had a \$107,718 cost impact, we think an award without resolving this matter through discussions was in effect a waiver on the part of the agency of these rates which deprived other offerors of an opportunity to compete on a common basis.

RGI argues that by contract it is obligated to pay the required wages, and thus the government received the low offer. The Navy made essentially the same argument previously. The Navy asserted that the \$107,718 could be absorbed in RGI's first year profit of approximately \$200,000. We reject this argument. We think that by waiving the wages in its cost evaluation and permitting RGI to absorb wages in its profit fee, the agency knowingly provided RGI an advantage not afforded UII which submitted responsive labor rates. We think this defeats the purpose of the cost realism evaluation. Notwithstanding that the contract subsequently imposed an obligation on RGI to pay the higher rates, the flawed cost evaluation gave RGI a cost advantage to which it was not otherwise entitled. In short, we are not concerned with the administration of the

contract, but rather the propriety and evenhandedness of the evaluation.^{2/}

RGI also alleges that our prior decision requires the Navy to include "tens of thousands of dollars in hypothetical indoctrination costs" in its evaluation of RGI, despite the fact that RGI, the current incumbent, will not incur these costs.

We disagree. As indicated in our prior decision, the RFP required the Navy to evaluate all offerors on the basis of the same number of labor hours. The record showed that the Navy had evaluated each firm using a different number of labor hours because of RGI's incumbency. We therefore recommended that the Navy hold discussions with the competitive range offerors and evaluate proposals based upon the RFP's stated evaluation scheme, that is, evaluate proposals based upon the same number of labor hours. Contrary to RGI's suggestion, however, we do not think that this recommendation requires the Navy to add "tens of thousands of dollars in hypothetical indoctrination costs" to RGI's offer. Rather, our recommendation leaves to the discretion of the agency the decision of how best to accomplish implementation of our recommendation. For example, the Navy could choose to evaluate proposals exclusive of the costs associated with the indoctrination period labor hours, and in so doing perform its evaluation consistent with the RFP's requirement that all firms be evaluated on the basis of the same number of labor hours. We therefore think that our initial recommendation needs no clarification.

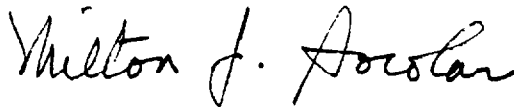
Finally, RGI argues that UII will be afforded an unfair advantage in any subsequent discussions because of information allegedly disclosed during the initial protest proceeding and that the result of reopening will be an auction.

^{2/} RGI also alleges that the wage rates at issue are a matter of dispute between the Navy and RGI. RGI therefore argues that we have made an SCA-wage determination by requiring the Navy to evaluate proposals based upon the disputed wage rates since the propriety of the RFP's wage rates, and therefore the Navy's evaluation, have not been determined. As stated in our decision, we were concerned with the agency's unequal application of the RFP's SCA mandated wage rates in the cost evaluation of proposals, not the propriety of the RFP's wage rate determination.

We decline to modify our original recommendation. We find no evidence in the record to suggest that such a disclosure of proprietary information occurred and RGI has provided us with no such evidence. In this respect, the agency provided our Office with copies of the agency report which had been furnished to UII. The Navy carefully redacted all information which could be viewed as either proprietary or competition sensitive, including the agency's assigned technical point scores and the names of individuals proposed by RGI. Under these circumstances, we cannot conclude that UII derived any information from the documents filed in connection with the initial protest which would afford the firm an undue competitive advantage.

As to the allegation that an auction situation will result from any subsequent discussions in this acquisition, we point out that the defect which we found in the Navy's actions in this case amounted to a violation of an express statutory requirement contained in CICA. Under such circumstances, the risk of an auction becomes secondary to preserving the integrity of the competitive procurement system, which in this case requires an opening of discussions and a reevaluation of proposals in accordance with the RFP's stated evaluation scheme. See Cubic Corp.--Request for Recon., B-228026.2, Feb. 22, 1988, 88-1 CPD ¶ 174.

The prior decision is affirmed.



Acting Comptroller General
of the United States